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Nos. 101 and 102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

CITY OF CHICAGO, et al., *Appellants*

v.

UNITED STATES OF AMERICA, et al., *Appellees*

On Appeals from the United States District Court for the Northern District of Illinois

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

No. 102

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeals from the United States District Court
for the Northern District of Illinois

BRIEF FOR APPELLANTS

Appellants in these consolidated appeals are 9 communities, 7 State regulatory commissions, 1 State, 3 labor organizations, and 1 railroad patron association.[1] They appeal

[1] Appellants in No. 101 are City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Indiana Public Service Commission, Georgia Public Service Commission, Tennessee Public Service Commission, Alabama Public Service Commission

from the orders of the United States District Court for the Northern District of Illinois, entered January 8, 1969, dismissing their complaints seeking to set aside orders of the Interstate Commerce Commission relating to the discontinuance of a portion of the "Georgian" passenger train, and the complete discontinuance of the "Hummingbird" passenger train.

OPINIONS BELOW

The opinion of the court below in the "Georgian" case is reported at *City of Chicago v. United States*, 294 F. Supp. 1103. (A. 10-14) The opinion in the "Hummingbird" case is reported at *Tennessee Public Service Commission v. United States*, 294 F. Supp. 1106. (A. 15-16) Both opinions were rendered January 8, 1969, and the "Hummingbird" opinion incorporates by reference the opinion in the "Georgian" case.

The report of the Interstate Commerce Commission (Commission) in the "Georgian" case was entered January 25, 1968, and is reported at *Chicago & E.I. R. Co. Discontinuance—Chicago & Evansville*, 331 I.C.C. 447 (1968). (A. 19-41) The orders of the Commission upon reconsideration, original and corrected, entered May 8, and served May 15, 1968, are not reported. (A. 42-45).

The report of the Commission in the "Hummingbird" case was entered September 3, 1968, and is reported at *Louisville & N. R. Co. Discontinuance of Trains*, 333 I.C.C.

Mississippi Public Service Commission, Kentucky Railroad Commission, Maurice F. Radrizzi (United Transportation Union), and National Association of Railroad Passengers.

Appellants in No. 102 are City of Chicago, Tennessee Public Service Commission, Public Utilities Commission of Ohio, Alabama Public Service Commission, Mississippi Public Service Commission, Kentucky Railroad Commission, State of Louisiana, The Metropolitan Government of Nashville and Davidson County, Tennessee, Railway Labor Executives' Association and United Transport Service Employees (AFL-CIO).

720 (1968). (A. 48-67) The order of the Commission upon reconsideration, entered October 31, 1968, is not reported. (A. 68)

JURISDICTION

These proceedings were brought in a three-judge federal district court under 28 U.S.C. 1336(a), 2284, 2321-25, to set aside orders of the Interstate Commerce Commission. The orders of the district court dismissing the complaints were entered on January 8, 1969. Appellants filed their notices of appeals on March 6, 1969. This Court noted probable jurisdiction and consolidated the appeals on June 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The statutory provisions involved, set forth in the Appendix to this brief, are as follows:

Interstate Commerce Act, Sections 13a(1) and 17(9), 49 U.S.C. 13a(1) and 17(9);

Judicial Code, 28 U.S.C. 1336(a).

QUESTION PRESENTED

Do the United States District Courts possess jurisdiction to review decisions and orders of the Interstate Commerce Commission, entered under 49 U.S.C. 13a(1) after hearing and investigation, where the Commission has found that an interstate passenger train, or a part thereof, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce?

STATEMENT

These appeals will determine whether the public has the same right as a railroad to seek judicial review of final decisions of the Interstate Commerce Commission in passenger train discontinuance cases. This determination has been

made by the court below and by seven other three-judge district courts. Two early decisions ruled that States do not have the right to sue to set aside orders of the Commission, entered after hearing and investigation, where the Commission finds that a passenger train is not required by public convenience and necessity and that continued operation of a train will unduly burden interstate or foreign commerce. *State of Minnesota v. United States*, 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire v. United States*, 251 F. Supp. 421 (D. N.H. 1965).

Subsequently, five district courts ruled to the contrary and held that the public does have the same right of judicial review as a railroad. *State of Vermont v. Boston & Maine Corp.*, 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport v. United States*, 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968); *State of New York v. United States* (No. 67-CV-207, N.D.N.Y. 1969);[2] *City of Chicago v. United States* (No. 68-C-2184, N.D. Ill. 1969); and *City of Sheridan v. United States* (No. 5316-Civil, D. Wyo.). Judicial review is pending, and trains are being operated pursuant to restraining orders, in *Penna. Pub. Util. Comm. v. United States* (No. 69-280, M.D. Pa.).

Another district court assumed jurisdiction without discussion. *People of State of California v. United States*, 258 F. Supp. 950 (N.D. Calif. 1966).[3] Mr. Justice Harlan, acting as a Circuit Justice, expressed an initial view that ultimate review does exist. *Public Service Board of State of Vermont v. United States*, 87 S. Ct. 3, 17 L.Ed.2d 42 (1966).[4]

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[2] Appeal pending, No. 100, O.T., 1969.

[3] Two unreported decisions have likewise assumed jurisdiction without discussion. See: 251 F. Supp. at 425.

PROCEEDINGS BELOW

The "Georgian" passenger train is operated jointly by Chicago & Eastern Illinois Railroad Company (C&EI) and Louisville & Nashville Railroad Company (L&N), between Chicago, Ill. and Atlanta, Ga., daily in each direction. The train is transported by C&EI for the 287 miles over its line between Chicago, Ill. and Evansville, Ind., where L&N engines and crews are substituted. L&N operates the "Georgian" for the remaining 444 miles to Atlanta, Ga., serving intermediate points such as Nashville and Chattanooga, Tenn.[4]

The "Hummingbird" train is operated by L&N between Cincinnati, Ohio and New Orleans, La., a distance of 927 miles entirely over L&N's line, serving intermediate points such as Louisville, Ky., Nashville, Tenn., Birmingham, Montgomery and Mobile, Ala., and Biloxi, Miss. The "Georgian" and "Hummingbird" trains interconnect at Nashville, Tenn. in the middle of the night, where certain coaches and sleeping cars are transferred between the two trains. Thus passengers may board the "Georgian" at Chicago in the early evening and arrive the following morning at Birmingham on the "Hummingbird" without having changed seat or berth.

On August 31, 1967, C&EI sought to discontinue all passenger service over its Chicago-Evansville line.[5] C&EI on

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[4]Both C&EI and L&N denominated their segments of the "Georgian" as No. 93 (southbound) and No. 54 (northbound). (A. 23)

[5]C&EI and L&N were at that time in the process of negotiating the sale of C&EI's Chicago-Evansville line. *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), affirmed sub nom. *Illinois Central Railroad Company v. United States*, 263 F.Supp. 421 (N.D.Ill. 1966), aff'd *per curiam*, 385 U.S. 457 (1967). Such negotiations were to be completed within one year from February 7, 1967. The sale agreement was filed March 19, 1968 with the Commission, and subsequently approved. *Louisville & N.R. Co.–Pur.–Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968) and *Louisville & N.R. Co.–Trackage Rights*, 334 I.C.C. 412 (1969). The sale of the Chicago-Evansville line was consummated June 5, 1969. With respect to C&EI-L&N passenger train service, see 327 I.C.C. 279 at 298, 301, 332, 338, 361-62.

that day filed a discontinuance notice with the Commission pursuant to section 13a(1), mailed copies of the notice to the Governors of the States of Illinois and Indiana and posted the notice at all its stations in Illinois and Indiana, stating its intention to discontinue, effective October 1, 1967, its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind. Simultaneously, C&EI also filed a petition pursuant to Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2), for authority to discontinue its daily intrastate train between Chicago and Danville, Ill. known as the "Danville Flyer".[6]

The Commission, in its Finance Docket No. 24725, on September 18, 1967, instituted an investigation into the proposed discontinuance of C&EI's segment of the "Georgian", and by the same order required continued operation of the trains for the maximum statutory period of four months pending hearing and decision in its investigation. (A. 17-18) The proceeding was heard on a consolidated basis with the "Danville Flyer" (Finance Docket No. 24726).[7] By report and order dated January 25 and served January 31, 1968, Division 3 of the Commission allowed discontinuance of C&EI's segment of the "Georgian" trains. 331 I.C.C. 477. (A. 19-41) The C&EI segment was discontinued February 1, 1968, so that the "Georgian" now operates only between Evansville, Ind. and Atlanta, Ga.[8]

[6]C&EI train No. 3 (southbound) and No. 4 (northbound).

[7]Sometimes referred to as the Companion case. Discontinuance of the "Danville Flyer" was denied August 14, 1968 in *Chicago & Eastern Illinois R. Co. Discontinuance*, 333 I.C.C. 626. C&EI on January 23, 1969 filed suit to set aside the Commission's decision. *Chicago & Eastern Illinois R. Co. v. United States* (No. 69 C 136, N.D. Ill.-E.D.). Hearing has been set for September 26, 1969 before Cummings, C.J., Austin and Marovitz, D.J.J.)

[8]L&N on July 9, 1969 filed notice that it proposed to discontinue the remaining Evansville, Ind.-Atlanta, Ga. segment of the "Georgian" effective August 13, 1969, now renumbered as No. 3 (southbound) and No. 4 (northbound). An investigation has been instituted, and

Certain protestants in the "Georgian" case petitioned the Commission for reconsideration alleging, among other things, that C&EI had not effectively invoked the provisions of Section 13a(1), and thus had not superseded the jurisdiction of the State regulatory commissions, because notice of the proposed discontinuance was not posted at stations south of Evansville, Ind., and that the notice, as posted, failed to describe the through-route nature of the train.[9] Division 3 of the Commission, acting as an Appellate Division, by order entered May 8 and served May 15, 1968 at 9:30 A.M., ruled in protestants' favor and dismissed the entire proceeding for failure of C&EI to invoke effectively the Commission's jurisdiction. (A. 42-43) However, some five and one-half hours later in that same day a so-called corrected order was issued holding the earlier order to be erroneous and denying protestants' petition in all respects. (A. 44-45) Appellants on May 27, 1968, instituted their action in the district court to review the Commission's decision. (A. 69-88).[10]

While the petition for reconsideration which resulted in the corrected order was pending before the Commission in the "Georgian" case, L&N, on April 3, 1968, posted and filed a section 13a(1) notice that it would discontinue, effective May 7, 1968, the connecting "Hummingbird" train over its entire run between Cincinnati, Ohio and New Orleans, La. The basic reason given by L&N for this action

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continued operation required pending hearing and decision in Finance Docket No. 25765, *Louisville and Nashville Railroad Company Discontinuance of Trains Nos. 3 and 4 Between Atlanta, Ga. and Evansville, Ind.; and Nos. 5 and 10 Between Evansville and St. Louis, Mo.* (July 30, 1969). A decision is expected about December 12, 1969.

[9]In essence the issue posited is the meaning of "train" as set forth in section 13a(1).

[10]The Commission on June 25, 1968 suggested a change in the notice provision of section 13a(1). *Study of Essential Railroad Passenger Service*, Hearings before subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., 2d Sess., 143-47 (1968).

was that the discontinuance of C&EI's segment of the "Georgian" on February 1, 1968 had resulted in the immediate loss of the bulk of the passenger business handled on the "Hummingbird" between Cincinnati and New Orleans. The Commission on April 24, 1968 instituted an investigation into the proposed discontinuance of the "Hummingbird", and required continued operation for the maximum period of four months pending hearing and decision in its investigation. (A. 46-47)

Division 3 of the Commission, by report and order dated September 3 and served September 6, 1968, allowed the "Hummingbird" to be discontinued. 333 I.C.C. 720. (A. 48-67) In the report written by Commissioner Tuggle,[11] Division 3 took note of the pending court proceeding involving the "Georgian" train, but stated that the Commission could not "await (perhaps longer than a year) developments which, in the end, might or might not change the picture". 333 I.C.C. at 727-28. (A. 57-58) Upon service of the report and order, appellants that day instituted their action in the court below to review the "Hummingbird" decision. A temporary restraining order, barring L&N's discontinuance of the "Hummingbird", was entered September 6 (A. 112) and continued September 12, 1968. (A. 113)

The "Georgian" and "Hummingbird" cases were heard together by the same three-judge district court on November 4, 1968. Plaintiffs in the "Georgian" case had moved for summary judgment, largely based upon the jurisdictional grounds set forth in the Commission's first order served May 15, 1968. (A. 42-43) Defendants C&EI and L&N moved for dismissal of the complaints for lack of subject-matter jurisdiction in the court. (A. 89-94; 106)

The Opinions of January 8, 1969

The district court on January 8, 1969 granted the railroads' motions and dismissed both actions on jurisdictional

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[11] Commissioner Tuggle also was author of the "Georgian" report.

grounds, dissolving the temporary restraining order immediately. The "Hummingbird" opinion incorporated by reference the "Georgian" opinion. (A. 16) The court reasoned that where, as here, the Commission concluded after hearing and decision in its two investigations that continued operation of the trains is not warranted, the resultant order terminating each investigation is not a reviewable "order" within the meaning of the Judicial Code authorizing suits to set aside orders of the Interstate Commerce Commission. 28 U.S.C. 133(a). (App. 3) The district court acknowledged that the railroads have a right of review where they lose at the Commission, since an "order" requiring continued train operation would be involved. It also recognized that "there might be some unfairness here", but concluded "it is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review (instituted by the public). The court noted that it was the delays by the State commissions that called forth the passage of section 13a(1), and held that Congress intended to deny judicial review in cases such as these. 294 F. Supp. at 1106-7. (A. 13-16) In view of its opinion on the jurisdictional issues, the court did not pass on the other questions presented. 294 F. Supp. at 1106. (A. 14)

Application for stay was denied January 9, 1969 by District Judge J. Sam Perry for want of jurisdiction of a single judge to stay the execution of a three-judge court order, noting the absence from the City of the other two participating judges. (A. 114) L&N that day immediately terminated the "Hummingbird" in mid-run at Birmingham, Ala., before an application for stay could be docketed with Mr. Justice Marshall that afternoon. The application was denied January 13, 1969.[12]

This Court on June 16, 1969 noted probable jurisdiction and consolidated the appeals. 89 S. Ct. 2103, 23 L. Ed. 2d 744.

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[12]The tumultuous events of January 9, 1969 are summarized in the weekly *Traffic World*, Vol. 137, No. 3, at p. 45 (Jan. 18, 1969).

SUMMARY OF ARGUMENT

These are the first appeals involving the interstate passenger train discontinuance provisions of Transporation Act of 1958 to be given plenary review by this Court. The sole issue presented concerns the right of judicial review where the Interstate Commerce Commission, after hearing and decision in its investigation, finds that a train is not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce. It is settled that in instances where the Commission does require continued operation, the railroad may seek judicial review under 28 U.S.C. 1336(a) because an "order" is entered requiring such operation. However, where the Commission finds that a train should be discontinued at the conclusion of its investigation, the order entered is one discontinuing the investigation. The court below held that such an order is not an "order" within the meaning of 28 U.S.C. 1336(a), so that States and the public do not have a right of judicial review when the agency's decision is adverse to them.

Contrary to the opinion below, the legislative history and statutory language support a right of judicial review where the Commission allows a train discontinuance after hearing and decision in its investigation. Commission orders which simply discontinue an investigation have been subject to judicial review since the "negative order" doctrine was overruled in 1939 and the Administrative Procedure Act was enacted in 1946. The contention that the Commission has unreviewable discretion whether to institute an investigation in the first place in no event renders the final agency decision immune from judicial review where the Commission has elected to conduct an investigation.

The statutory purpose of Section 13a(1) was to eliminate alleged delays by the State Commissions in the processing of train discontinuance applications. Congress was not concerned with "delays" attendant upon judicial review. To effectuate its goal Congress gave the Interstate Commerce

Commission a maximum period of four months within which to conduct its investigation. The concern of Congress with delays did not go beyond the agency level. Congress did not manifest any desire to curtail judicial review—and certainly did not indicate an intention to create the unfair and one-sided result of allowing judicial review to the railroads while denying a similar right to the public.

ARGUMENT

I. CONGRESS DID NOT INTEND THE UNFAIR RESULT OF DENYING JUDICIAL REVIEW TO THE PUBLIC WHILE GRANTING JUDICIAL REVIEW TO THE RAILROADS

The court below, in both opinions, inferred an intention of Congress to deny States and the public a right to seek judicial review of a passenger train discontinuance, while preserving such a right for the railroads when a train is ordered to be continued in operation by the Commission. The district court erred in assuming such a manifestly unfair and unjust intent by Congress to preclude judicial review for the public, but to grant a right of review to the railroads.

Section 13a of the Interstate Commerce Act was enacted as Section 5 of Transportation Act of 1958, 72 Stat. 571. It is composed of two paragraphs. Section 13a(1) governs the discontinuance or change of operation or service of a train operating in two or more States, whereas section 13a(2) applies when a train is operated wholly within a single State.

By enactment of section 13a(1), a railroad now has the option of having the Interstate Commerce Commission, rather than the State commissions, pass upon the discontinuance or change of service of an interstate passenger train. The only prerequisite to commencement of the procedure provided by section 13a(1) is that the contemplated discontinuance or change be subject to the jurisdiction of at least one of the States through which the train is oper-

ated. If this condition is satisfied, the carrier or carriers operating the train may invoke section 13a(1), and supersede State jurisdiction, by the filing, posting and mailing of notice at least 30 days in advance of any such proposed discontinuance or change. The Interstate Commerce Commission has authority within the 30 days notice period to enter upon an investigation of the proposed discontinuance or change, and may require continued operation for a maximum period of four months pending hearing and decision in the investigation. However, if the Commission determines not to enter into an investigation, or not to require continued operation pending hearing and decision, the carrier or carriers filing the notice may discontinue or change any such operation or service pursuant to the notice, irrespective of State laws.

If, after hearing in its investigation, the Commission finds that the trains are required by public convenience and necessity and that continued operation will not unduly burden interstate or foreign commerce, the Commission is empowered to require continued operation for a maximum period of one year from the date of said order. Upon the expiration of such an order after the investigation, jurisdiction reverts to the States, and the carrier or carriers are again free to exercise the option of invoking section 13a(1) by the filing, posting and mailing of new notices.

Where the Commission, after hearing and decision in its investigation, finds that the trains are not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce, an order is entered discontinuing the investigation, and the four-month continuance order is allowed to expire—any discontinuance of the trains thereafter being pursuant to the expiration of such order.

These appeals involve a train, and a portion of another train, which the Commission found, after hearing and decision in its investigations, were not required by public convenience and necessity and which would unduly burden

interstate and foreign commerce. The orders discontinuing the proceedings are clearly orders within the meaning of 28 U.S.C. 1336(a), and are subject to judicial review.

A. Legislative History. The district court seems to have recognized, as have other lower courts which have passed upon the question, that there is nothing specific in the legislative history of section 13a(1) to suggest that Congress intended to deny to the public the right to judicial review, while preserving that right to the railroads. The three-judge court for the District of Vermont stated, *State of Vermont v. Boston & Maine Corp.*, 269 F. Supp. 80, 84 (1967):

> " . . . we fail to find convincing evidence that the Congress intended the unusual and concededly unfair result of granting judicial review of the Commission's determination solely to the roads, and not to opposing parties.
>
> " . . . If an order is wrongfully granted, the road can obtain review and reversal. If an order is wrongfully refused, ordinary principles of review of administrative determinations, as well as elemental fairness call for review at the instance of opposing parties. Congress having set standards for the Commission in the Act, its decision to refuse to order continuance as well as its decision to order it, should be reviewable."

The district court for the Middle District of Pennsylvania stated in *City of Williamsport v. United States*, 273 F.Supp. 899, 902 (1968):

> "A reading of the legislative history of the Transportation Act of 1958 indicates that Section 13a was designed to permit railroads, at their option, to have the Interstate Commerce Commission, rather than State Commissions, pass upon discontinuances or changes in the operation or service of trains. There is nothing to suggest that Congress intended to deny judicial review of passenger discontinuances."

There were no committee hearings held on the passenger train discontinuance provisions of S. 3778 and H.R. 12832 (85th Cong., 2d Sess.) which, as modified, became section 13a of the Interstate Commerce Act. The matter of judicial review was not raised in the floor debates. The committee and conference reports are silent.[13] This Court recently repeated its earlier ruling that Congress will not be presumed to cut-off judicial review unless there is strong reason to believe that such was the Congressional intent. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967):

> " . . . a survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

There is recognized presumption in favor of judicial review of final action by an administrative agency. Jaffe, *Judicial Control of Administrative Action,* 336-53 (1965). Such a presumption prevails particularly where, as here, the general statutory framework and tradition provide that in the course of orderly procedure decisions of the Interstate Commerce Commission shall be subject to judicial review. *Florida East Coast Railway Company v. United States,* 228 F. Supp. 340, 343 (M.D. Fla. 1964); *United States v. ICC,* 337 U.S. 426, 433-34 (1949). The existence of a reviewing court's subject-matter jurisdiction should not be dependent upon whether it is the railroad or the public which prevailed at the agency level, absent an explicit Congressional intention to create such a disparity.[14] Recent hearings of the Surface Transportation Subcommittee of the U.S. Senate Committee on Commerce indicate that it is the general opinion of the members of the subcommit-

[13] S. Rep. No. 1647, H. Rep. No. 1922, and H. Rep. No. 2274, 85th Cong. 2d Sess. (1958).

[14] Cf. *Union Pacific R. Co. v. Price,* 360 U.S. 601, 615-16 (1959).

tee that section 13a(1) was not intended to prohibit court review.[15]

The case at bar bears a remarkable similarity to the former situation, since overruled, whereby a railroad could have complete judicial review of Commission orders granting reparations for unlawful rates, while the unsuccessful shipper was denied any judicial review at all. *United States v. ICC*, 337 U.S. 426 (1949).

B. Statutory Language. As with the legislative history, there is nothing in the statutory language which precludes judicial review where the Commission, after hearing and decision in its investigation, concludes that a passenger train need not be continued in operation. Nevertheless, the court below, relying principally upon *State of Minnesota v. United States*, 238 F. Supp. 107 (D. Minn. 1965), gave two basic reasons for holding that the language of the statute conveys an intention by Congress to preclude judicial review from the public, while preserving it solely for the railroads. These reasons are (1) the type of order entered by the Commission where the agency concludes that a train should be discontinued after the investigation, and (2) a comparison between the statutory language in section 13a(1) with that contained in section 13a(2), the latter governing intrastate train discontinuances. It is respectfully submitted that neither of these reasons is sufficient to support an inference that Congress intended to preclude judicial review from the public.

1. "Negative Order" doctrine. Where the Commission at the end of the four month period permitted it by Congress finds that the train is not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce, the agency, as it did here, allows its four month continuance order to expire,

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[15] *Passenger Train Discontinuances*, Hearings before subcommittee on Surface Transportation of Senate Committee on Commerce, 89th Cong., 2d Sess. (1966).

and enters an order discontinuing the investigation.[16] The court below held that an order discontinuing the investigation is not an "order" within the meaning of 28 U.S.C. 1336(a), so that judicial review is unavailable, as it constitutes agency "non-action". 294 F. Supp. at 1105-6. (A. 13-14)

In thus denying judicial review of an order terminating an investigation by the Interstate Commerce Commission, the court below has resurrected the "negative order" doctrine, long since discarded by this Court. *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939):

> "We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

Indeed, the jurisdictional ruling made in *State of Minnesota v. United States*, 238 F. Supp. 107 at 112 (D. Minn. 1965), upon which the court below placed primary reliance, was in turn bottomed upon a case "effectively overruled"[17] by *Rochester Telephone Corp., supra. United States v. ICC*, 337 U.S. 426, 439-40, fn. 8 (1949).

Congress has specifically provided that orders of the Interstate Commerce Commission are subject to judicial review.[18] (App. 3) Moreover, the Administrative Procedure Act provides that judicial review of final agency action is available except to the extent that statutes preclude judicial review[19] or is committed to agency discretion by law.

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[16] The majority of the decisions rendered at the end of the four month period are made by Division 3 of the Commission, and thus are not administratively final, being subject to petitions for reconsideration. 49 CFR 1100.101(a)(2).

[17] *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299 (1927).

[18] 28 U.S.C. 1336(a).

[19] 5 U.S.C. 701(a)(1).

The same act defines an "order" as the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.[20]

An order of the Commission which simply discontinues an investigation has for many years been considered an "order" within the meaning of 28 U.S.C. 1336(a). Orders discontinuing rate investigations are every day practice in the Commission's administration of section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), where the agency enters into an investigation of a new or changed freight rate, with or without suspension pending the conclusion of the investigation. If after investigation the Commission finds the new or changed rate to be just and reasonable, it simply enters an order discontinuing the investigation, without commanding the railroad to do anything. Recent examples of judicial review where the Commission simply enters an order discontinuing an investigation into proposed rate changes are: *Forwarder Volume Commodity Rates, Chicago and New York*, 308 I.C.C. 455 (1959) and 310 I.C.C. 199 (1960), sustained in *Eastern Express, Inc. v. United States*, 198 F. Supp. 256 (S.D. Ind. 1961), aff'd *per curiam* 369 U.S. 37 (1962). *Aggregate Rates on Wearing Apparel-Ry. Exp. Agency*, 318 I.C.C. 737 (1963) and 326 I.C.C. 92 (1965), sustained in *Central & Southern Motor Frgt. Tar. Ass'n. v. United States*, 273 F. Supp. 823 (D. Del. 1967); *Drugs and Related Articles, New Jersey to Chicago*, 322 I.C.C. 734 (1963) and 326 I.C.C. 6 (1965) reversed in *Eastern Central Motor Carriers Ass'n. v. United States*, 239 F. Supp. 591 (D.C. 1965), 251 F. Supp. 483 (D.C. 1966); and *Eastern Central Motor Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5 (1961), sustained in *Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo. 1964) aff'd *per curiam* 379 U.S. 6 (1964).

Further, section 17(9) of the Interstate Commerce Act is applicable to judicial review of the "Georgian" and "Hum-

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[20] 5 U.S.C. 551(6).

mingbird" decisions of the Commission, since they were rendered by Division 3 of that agency, rather than by the full Commission. Section 1336(a) of Title 28 gives the district courts jurisdiction to review orders of the *Commission.* Section 17(9) of the Interstate Commerce Act provides that a suit to set aside a decision, order or requirement of a *division* of the Commission may be brought under the same provisions applicable in the case of suits to set aside orders of the Commission. (App. 2) Certainly the lengthy reports of Division 3 in these cases constitute "decisions" within the meaning of section 17(9).

2. Comparison with Section 13a(2). The court below states that non-reviewability for the public in section 13a (1) cases is supported by the language of section 13a(2), the latter paragraph requiring that Commission approval is expressly necessary for all intrastate train discontinuances. 294 F. Supp. at 1106. (A. 14) The district court erred in its conclusion based on this comparison. Simply because decisions of the Commission under section 13a(2) are made reviewable does not support a contention that Congress intended to *exclude* review of section 13a(1) decisions rendered after hearing. Indeed, it can be argued with equal force that Congress, having provided the public with the right of review under section 13a(2), also intended such right to exist under section 13a(1) absent an express declaration to the contrary. Recently this Court, in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967), quoted with approval from Jaffe, *Judicial Control of Administrative Action*, 357 (1965):

> "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right of review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

As originally introduced in the Congress, S. 3778 and H.R. 12832, 85th Cong., 2d Sess. (1958), proposed a single section 13a to deal with all passenger trains—intrastate as

well as interstate. Section 13a ultimately became divided into a section 13a(1) and a section 13a(2). The legislative history of this devision shows that differences in language between the two paragraphs have absolutely nothing to do with judicial review. The same standards are to apply for both types of trains. The differences between section 13a(1) and 13a(2) relate to differences in procedures prerequisite to a hearing in the case of a wholly intrastate train, and the intent was to give the Commission jurisdiction after State authorities first had been afforded an opportunity to act or had failed or refused to authorize a train discontinuance. *Southern R. Co. v. North Carolina*, 376 U.S. 93, 103 and fn. 14 (1964). Concern for the initial jurisdiction of the States caused the differences in procedure between the two paragraphs. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1 (1963).

There is nothing to suggest that Congress desired to go beyond these procedural differences. At no point in the language of section 13a(2) does the word "order" appear. Section 13a(2) merely says that the Commission may "authorize" a train discontinuance.[21] Certainly this is no different from authorization of a train discontinuance under section 13a(1) by an order discontinuing the investigation, entered after an evidentiary hearing and accompanied by a report with detailed findings and conclusions.

C. **Agency Discretion To Institute an Investigation.** The district court stated an additional reason in support of its holding that agency action in a passenger train discontinuance case is not subject to judicial review, namely, the Commission has unreviewable discretion in determining whether to institute the investigation. The court cited as authority *State of New Jersey v. United States*, 168 F. Supp. 324 (D.N.J. 1958), aff'd *per curiam* 359 U.S. 27, *reh. den. sub nom. County of Berger v. United States*, 359 U.S. 950

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[21] The report of the Senate committee uses the word "authorize" without distinction as to intrastate or interstate trains. S. Rep. No. 1647, 85th Cong., 2d Sess., 14 (1958).

(1959),and *Sludden v. United States*, 211 F.Supp. 150 (M. D. Pa. 1962). However, those cases involved a ferry and a train discontinuance in which the Commission failed to institute an investigation within the 30 days' notice period. Consequently, the discontinuances became operative pursuant to the carriers notices. 294 F.Supp. at 1105. (A. 11-13) The appeals now before this Court involve an entirely different situation, because here the Commission *did* institute investigations, conducted extensive hearings, and issued comprehensive reports containing its findings and conclusions. But even if it ultimately should be held that a decision not to investigate a proposed discontinuance is non-reviewable, a question not presented by these appeals,[22] it nevertheless does not follow that a decision of the Commission rendered after hearing and investigation is likewise immune from judicial review. For example, the action of the National Labor Relations Board in not issuing a complaint is generally committed exclusively to that agency's discretion, yet if that agency does issue a formal complaint, its ultimate decision is subject to judicial review.[23]

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[22] Appellants do not concede, and contrary to the opinion of the court below (294 F. Supp. at 1105), did not concede there that there is no judicial review where the Commission decides not to enter into an investigation of a proposed train discontinuance. *State of New Jersey* held only that such a decision, consisting of a "notice", was not an "order" within the meaning of 28 U.S.C. 1336. 168 F. Supp. at 328-29. The district court in *State of New Jersey* did recognize and take jurisdiction under 28 U.S.C. 1331, 168 F. Supp. at 328, and considered whether the Commission's decision not to investigate was arbitrary or capricious. 168 F.Supp. at 335. Moreover, the author of that opinion subsequently recognized as reviewable an order denying reconsideration of a decision not to institute an investigation on jurisdictional grounds under 28 U.S.C. 1336 and 49 U.S.C. 17(9). *New York, Susquehanna & Western R. Co. v. United States*, 200 F. Supp. 860, 863 (D.N.J. 1961), rev. on other grounds sub nom. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1 (1963). It would seem incontestable, therefore, that there are limits to the Commission's discretion whether or not to hold an investigation.

[23] See *Jaffe, supra* at pp. 360-61 for a collection of cases on initial discretion in the labor field, but reviewable final action; Note, *Judicial Reviewability of NLRB Rulings*, 63 Nw. U.L. Rev. 106 (1968).

Another example is found in the action of the Interstate Commerce Commission in the exercise of its power to suspend new or changed freight rates, where the decision of the Commission is committed to its discretion. *Luckenbach Steamship Company v. United States*, 179 F. Supp. 605 (D. Del. 1959), dismissed as moot 364 U.S. 280 (1960); *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963). Yet, the findings of the Commission in such cases made upon completion of the investigation are subject to judicial review. *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. United States*, 229 F. Supp. 572 (S.D. Ohio 1964), mod. sub. nom. *Arrow Co. v. Cincinnati, N.O. & T.P.R.*, 379 U.S. 642 (1965).

Moreover, the court below incorrectly viewed train discontinuances which take place at the end of the four month investigation period as discontinuances which occur "automatically" in the same sense as a train discontinuance occurring "automatically" at the end of the 30 days' notice period. 294 F.Supp. at 1105. (A. 11-12) This is erroneous since a train discontinuance taking place pursuant to the carrier's notice at the end of the 30 days' notice period, in accordance with the second sentence of section 13a(1), differs from a train discontinuance taking place upon the expiration of the Commission's four month interim order.[24] A train discontinuance which becomes effective after hearing and decision in an investigation does not take place "automatically".[25] Such a train discontinuance after the four

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[24]Section 13a(1) technically does not provide for the "suspension" of a train discontinuance notice, as with the suspension of a changed freight rate pursuant to 49 U.S.C. 15(7), because the Commission issues an order affirmatively requiring continued train operation pending hearing and decision in its investigation. Nor do the Commission's rules provide for suspension supplements to the carrier's notice of proposed discontinuance. Cf. 49 CFR 1122 and 49 CFR 1300.8(k).

[25]The opinion below erroneously states that appellants concede that the source of the authority to discontinue after hearing in the

month period is as a result of a determination by the Commission not to renew its prior order, which it might have done for an additional period of up to one year. In such instances the Commission allows the initial order directing continued operation to expire, and discontinues the investigation accompanied by the statutory findings required by section 13a(1).

Once the Commission enters upon a formal investigation into a proposed train discontinuance, conducts hearings and compiles a record, it is not free to ignore the statutory standards prescribed by section 13a(1). The Commission does not have discretion to render erroneous decisions after such investigations, because its findings must in turn be supported by substantial evidence and otherwise in compliance with legal standards by which the correctness of agency action is traditionally measured. If it were otherwise, the hearings required to be held by the terms of section 13a(1) would be meaningless. Judicial review is the technique by which Congress insures that its standards will be carried out by the administrative agency.

The possibility that the Commission ultimately may be held to possess certain discretion in deciding whether to institute an investigation[26] does not justify making the far-reaching conclusion that the Commission is relieved of all responsibility for having its reports comply with the standards set by Congress in section 13a(1).

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investigation stems from the statute rather than from any action of the Commission. 294 F. Supp. 1105. No such concession was made.

[26] The authority for the proposition that the Commission has unreviewable discretion whether to institute a train-off investigation rests upon *State of New Jersey v. United States*, 168 F. Supp. 324 (D. N.J. 1958), aff'd *per curiam* 359 U.S. 27 (1959). By the same token the judgments below might have been summarily reversed upon the authority of *City of Williamsport v. United States*, 273 F. Supp. 899, 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968).

II. THE STATUTORY PURPOSE OF SECTION 13a(1) IS DIRECTED AGAINST DELAYS BY STATE COMMISSIONS AND NOT AGAINST ORDERLY JUDICIAL REVIEW.

An important concern of the court below would appear to be its belief that Congress intended no judicial review because that might create "delays" in finally determining whether a train discontinuance is warranted. The court referred to the "crisis" facing the railroads in 1958, implying that the "spirit" of the legislation "was to give the railroads rapid relief without lengthy judicial review". 294 F. Supp. at 1106. (A. 13)

Transportation Act of 1958 was motivated by the financial condition of the railroads. The legislation was the outgrowth of hearings held in early 1958 by the Subcommittee on Surface Transportation of the U.S. Senate Committee on Interstate and Foreign Commerce. The Subcommittee recommended eight amendments to the Interstate Commerce Act, but only one of these—and the least discussed—was concerned with passenger train service, and then only as part of unprofitable services generally:

> "(5) To vest the Interstate Commerce Commission with authority to authorize, in proper cases, the discontinuance, curtailment or consolidation of unprofitable railroad services and facilities burdening interstate commerce."[27]

Other proposed amendments included loan guarantees, construction reserve funds, competitive ratemaking, State rate discriminations, motor carrier agricultural exemptions, private motor transportation, and provisions for transportation policy studies. In short, passenger service was but one of many recommendations. The legislation, as enacted, embraced all of these recommendations with the exception of construction reserve funds and transportation policy studies. There is nothing to suggest that only the passenger train

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[27]S. Rep. No. 1647, 85th Cong. 2d Sess., 14 (1958).

amendment to the Interstate Commerce Act—and then only the so-called "negative" orders under section 13a(1)—were to be exempted from judicial review. In marked contrast are the other amendments to the Interstate Commerce Act made by Transportation Act of 1958. Action taken under the new or revised sections 1(2)(a), 1(17)(a), 13(4),[28] 15a,[29] 203(b),[30] 203(c),[31] and section 13a(2)[32] are subject to review in the courts.

Congress was concerned with alleged delays by State regulatory authorities in authorizing, or absolutely refusing to authorize, discontinuance of little-used services.

The House Committee report stated.[33]

> "Under the act, the Interstate Commerce Commission has jurisdiction over the complete abandonment of a line of track. The discontinuance or change of schedules of trains (without complete abandoning of the line of track over which they operate) however, is subject to the jurisdiction of the interested States. Such local regulation of what has come to be a national problem has hampered the railroads from making some changes in their passenger train operations in line with changes in patronage, and has contributed greatly to the passenger deficit. Witnesses have not suggested that all State commissions have taken obstructive atti-

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[28] *Utah Citizens Rate Association v. United States*, 192 F. Supp. 12 (D. Utah 1961), aff'd *per curiam* 365 U.S. 649 (1961).

[29] *ICC v. New York, N.H. & H. R. Co.*, 372 U.S. 744 (1963); *American Lines v. L. & N. R. Co.*, 392 U.S. 57 (1968).

[30] *Willis Shaw Exp. v. United States*, 377 U.S. 159 (1964).

[31] *Red Ball Motor Freight v. Shannon*, 377 U.S. 311 (1964).

[32] *State of Montana v. United States*, 202 F. Supp. 660 (D. Mont. 1962); *City of Philadelphia v. United States*, 197 F. Supp. 832 (E.D. Pa. 1961); *People of State of California v. United States*, 207 F. Supp. 635 (N.D. Calif. 1962).

[33] H. Rep. No. 1922, 85th Cong. 2d Sess., 12 (1958).

tudes, but only that it has proved impossible to secure necessary relief in some States. The National Association of Railroad and Public Utilities Commissioners has been active in recommending a more helpful attitude on the part of its members, but the recommendations appear not to have been adopted by some of them.

"Because of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry."

The Senate report also took aim at the State agencies:[34]

"Railroad management, it must be understood, is not always free without authorization to discontinue, curtail, consolidate or otherwise change services or facilities in an effort to deal realistically with unprofitable, deficit-producing operations. Generally speaking, such matters fall within the scope of State law; and in a great many instances a railroad may not discontinue or change the operation of a train or other service or facility without first obtaining permission to do so from the regulatory authority of the State in which the operation is conducted.

"Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit."

As a result of alleged delays by State commissions, the Interstate Commerce Commission was given a maximum

[34]S. Rep. No. 1647, 85th Cong., 2d Sess., 21-22 (1958).

period of four months, beyond the notice period, within which it could require continued operation of a train pending hearing and decision in its investigation. This literally compels a decision within the five-month period if the Commission is to keep the train in operation.

The charges of delay by the State commissions did not extend to the State judiciary. There was no claim by the Congress that the State courts were tardy in their judicial review of State regulatory commission decisions. Thus there is no basis whatsoever for assuming that Congress, in providing an optional forum for the railroads, desired to curtail court review of decisions authorizing train discontinuances.[35] Section 13a(1) was directed specifically against the State regulatory agencies—the statute is cast in terms of "superseding" State law. Contrary to the opinion of the court below, Congressional concern with delays by the State commissions cannot be extended so as to infer a concern by Congress with the time consumed in orderly judicial review of agency action.

As of December 31, 1968 the Commission had instituted a total of 232 investigations since enactment of section 13a(1) in 1958.[36] Of these 232 investigations, judicial review has been sought in only 13 known instances, 2 of which are now before this Court in these consolidated appeals; and of the 13 court cases, injunctive relief was applied for in only 6 situations. Hence it is sheer fantasy to assert that the right of judicial review creates any "delay" crisis for the railroad industry.

The importance of judicial review cannot be overstated. The issues still unresolved below—principally represented by the two conflicting orders entered by the Commission in the "Georgian" case—are of fundamental importance to the administration of section 13a(1) by the Commission

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[35] Cf. *A.F. of L. v. Labor Board*, 308 U.S. 401, 409-10 (1940).

[36] Interstate Commerce Commission, *Proceedings Under Section 13a of the Interstate Commerce Act as of December 31, 1968* (1969).

and will affect a great number of other proceedings. (A. 42-45) Congress is well aware that the small percentage of cases which are reviewed in court nevertheless have a salutory effect upon the administrative process. Any "delay" in the final resolution of a few cases is more than offset by the watchdog role of the courts in policing the statutory standards set by Congress.

CONCLUSION

For the foregoing reasons, the decisions of the district court in these cases are in error in holding Congress deprived the public of a right to judicial review and should be reversed.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act. Title 49, United States Code:

Section 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four

months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

Section 17(9).

When an application for rehearing, reargument or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Judicial Code, Title 28, United States Code:

Section 1336(a).

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.